IN THE

Supreme Court of The United States

OCTOBER TERM, 19[illegible]

NO. 101

RUFUS BRAHAM

Appellant

MARTIN BRAVERMAN, et al

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

MOTION TO AFFIRM

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Rule 10(e), Revised Rules of the Supreme Court of the United States

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RUFUS BRACHAM,
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The Appellees, pursuant to Rule 16 (c) of the Revised Rules of the Supreme Court of the United States, move to affirm the appeal herein on the ground that it is manifest that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

The Appellee's argument in support of this Motion to Affirm will be developed under the following two points:

POINT I

Was the federal court below proper in its ruling that Florida had the power to deprive the Appellant of his right to vote, in consequence of his valid felony convictions?

POINT II

Did the court below properly rule it had no authority to review the basis or propriety of the Florida Pardon Board's refusal to grant a pardon to the Appellant?

ARGUMENT

POINT I

Was the federal court below proper in its ruling that Florida had the power to deprive the appellant of his right to vote in consequence of his valid felony convictions?

The thrust of the Appellant's contention here is that Florida's taking of the right to vote on the basis of a felony conviction creates a classification offensive to the Due Process and Equal Protection clauses of Section 1 of the 14th Amendment, as interpreted and given vigor by such recent opinions of this Court as *Reynolds v. Sims* (1964), 377 U.S. 533, 12 L.Ed.2d 506, 84 S.Ct. 1362 and *Harper v. Virginia Board* (1966), 383 U.S. 663, 15 L.Ed.2d 675, 86 S.Ct. 1079.

It is respectfully submitted the following points demonstrate the utter lack of substance to the Appellant's argument.

1. The Appellant relies on Section 1 of the 14th Amendment, and ignores both the clear wording and history of Section 2 of the same Amendment.

Section 2 of the 14th Amendment on its face excludes from the purview of Section 1 citizens whose right to vote has been abridged for participation in rebellion, or other crime.

It is suggested Section 2 clearly acknowledges the right of states to exclude from voting all persons convicted of crimes. It would be absurd to argue that this language was intended to deprive the states of this right, particularly in view of the fact that at the time of passage of the 14th Amendment, no less than 29 states were excluding from the vote persons convicted of crimes. *Green v. Board of Elections*, 16 A.2d, 19(2d Cir. 1965) 380 F.2d 445. That the history of the 14th Amendment contradicts the Appellant's position is acknowledged, in a somewhat perverse manner, by the very law review writer whose arguments the Appellant has cited to this Court. In Note, the Equal Protection Clause as a Limitation on the State's Power to Disenfranchise Those Convicted of a Crime, 21 Rutgers L. Rev. 291, 318-9, n. 140, the author argues the specific language of Section 2 be ignored because it "does not seem to serve any purpose," and also suggests an interpretation of this section not based on history because "the Court seems to have completely disregarded historical interpretations of the equal protection clause with respect to voting rights anyway."

2. Even after intense scrutiny, no federal court has considered this issue raises a substantial federal question. In *Green v. Board of Elections*, supra, the Second Circuit Court of Appeals considered precisely this issue and in an extensive opinion which is often cited for its exposition on what constitutes a substantial federal question, determined that this issue does not present one. The opinion of the Three Judge Court below cites the unbroken line of cases of this Court since 1880 which have acknowledged the right of the states to exclude persons convicted of a crime from voting, and the order of the court below convening a Three Judge Panel also held this issue did not present a substantial federal question. (See Appendix B to Appellant's Jurisdictional Statement).

Article X, Section 10, Fla Const., 1969

> "Felony, definition.—The term 'felony' as used herein and in the laws of this state shall mean any criminal offense that is punishable under the laws of this state, or that would be punishable if committed in this state, by death or by imprisonment in the state penitentiary."

The above quoted provisions clearly establish:

A. All persons adjudged guilty of felonies lose their right to vote in Florida.

B. The loss of the right to vote in Florida by reason of a felony conviction is automatic upon adjudication of guilt.

C. The phraseology of Section 97.041 (2) (d), F.S., is subject to two criticisms. The Appellant apparently reads the phrase "and whose civil rights have not been restored" to indicate that some persons adjudged guilty of crimes do not lose their civil rights while others do. This is simply not true. The phrase simply acknowledges the pardon power, the fact that a person who has received a full pardon, may vote, just as he may hold public office, avoid the consequences of perjury, or, for that matter, walk freely out of prison.

Furthermore, it is obvious that all of Section 97.041 (2) (d) is irrelevant and redundant, in view of the mandatory, self-executing character of Article IX, Section 1, Florida Constitution, 1969, quoted above.

D. Much of the appellant's argument rests on the assumption that right to vote cases such as *Carrington*, *supra*, have unlimited scope, that there is no restriction to the application of such broad statements as the comment:

> Leaving out from the franchise a sector of the population because of the way they may vote is constitutionally impermissible," *Carrington v. Rash*, *supra*, 13 L Ed 2d at 679.

Yet, it is obvious, such comments do have their rational limits. The Appellant would probably not care to argue that the states do not have the authority to "leave out" from the right to vote, all 10 year old children.

it is obvious they are not allowed to vote precisely because of "the they may vote" and because the states' right to exclude them from franchise is also a fact of history acknowledged by Section 2 of the Amendment. Indeed, if the argument is shifted to 18 year olds, the ple becomes even more illustrative.

is unnecessary to merely speculate on the obvious limits to these ies. These limits were acknowledged by this Court in [illegible] erson (1966), 384 U.S. 24, 16 L.Ed.2d 376, 86 S.Ct. 1380:

> "Neither in Reynolds v. Sims, nor in any other decision has this Court suggested that the States are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured." Burns v. Richardson, supra, 384 U.S. at [illegible] (Emphasis added)

POINT II

> That the court below properly ruled it had no authority to review the bases or propriety of the Florida Pardon Board's refusal to grant a pardon to the Appellant.

a preliminary matter, it should be noted that the Pardon Power of da is vested in seven men, the Governor and six Cabinet members whom are individually elected on a state-wide basis and all of whom executive responsibility for governing the state. Article 4, Section 8 da Constitution, 1968. For purposes of convenience the Appellee refer to this group as the "Florida Pardon Board," although as a tical matter, the power of executive clemency is exercised in Florida y a "Pardon Board," as such, but by the Governor with whom must n three of the six Cabinet members. The important point is that the rida Pardon Board" is not, and never has been, an administrative y created by, or subject to, legislative mandate. The pardon power in da is wholly a matter of constitutional creation, and is not subject to ative control. [illegible] v. State, (Fla. 1899), 37 So. 21.

The Appellant has sought to treat the restoration of civil rights as not a valid element of the Pardon Power. Florida has always treated the restoration of civil rights as simply one effect of a pardon, no different from the authority to commute a death sentence to life, or to entirely obliterate a conviction and turn an imprisoned man loose restored to all the rights and attributes of citizenship. *Opinion of Court*, (1872), 14 Fla. 318; *Singleton v. State*, supra; *Page v. Watson*, (Fla. 1938), 192 So. 205; *Ryan v. Burch*, (Fla. 1934), 154 So. 128; In re *Florida Board of Bar Examiners*, (Fla. 1966), 183 So.2d 688.

The Appellant has characterized the above case law of Florida a mere "labeling act" by which the state has claimed as a concommitant of the judicially unreachable Pardon Power something that really doesn't belong there.

It is perhaps unfortunate for the appellant's argument that it is the Florida Pardon Power under challenge, because it happens that in the seminal opinion which so construed Florida's Pardon Power, the Supreme Court of Florida reached this result simply by adopting this Court's construction of the Presidential Pardon Power.

> "When the pardon is full, it remits the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction it removes the penalties and disabilities and restores him to all his civil rights. It makes him as it were a new man, and gives him a new credit and capacity. There is only this limitation to its operation: it does not restore offices forfeited or property or interests vested in others in consequence of the conviction and judgment." (Ex parte Garland, 4 Wallace, 380)
>
> "Thus is the language of the Supreme Court of the United States when determining the effect of a full pardon by the President of the United States. There is nothing in the Constitution or laws of this State to vary its effect here." Opinion of Court, supra, at 319.
>
> (Emphasis added)

It is also notable that until Florida's present Constitution became effective in 1969, the Florida Constitutional Language creating and vesting the Pardon Power in a "Pardon Board" did not even refer to authority to restore civil rights, Article IV, Section 12, Florida Constitution, 1885, and it was only the case law of Opinion of the Court and *Ex parte Godwin*, supra, that indicated this "power" existed.

The Appellant appears to suggest that merely by granting a pardon to one person, thereby restoring his right to vote, the Pardon Board creates "unequal classes." This is quite true. As a practical matter, it is impossible to exercise the Pardon Power in any other manner, inasmuch as pardons do reflect executive clemency granted a single person rather than to entire classes (except in the unusual instance of amnesties). Consequently, any judicial requirement that restoration of the right to vote to one person creates a "right" to the same treatment of another felon will necessarily make the Pardon Power unworkable and put an end to it.

Courts in every jurisdiction, federal and state, have consistently held that the Pardon Power is an executive function no more subject to judicial review than is the authority of the President to deliver a State of the Union message to Congress. A pardon is possibly -- not always -- subject to question on the basis that the executive issuing it was not actually in office and empowered to deliver it at the time, or perhaps on the basis that the applicant for a pardon practiced fraud on the executive authority. These are the only bases for judicial review. In addition to the extensive case authority for this cited by the court below, see also 39 Am.Jur. Pardon, Reprieve and Amnesty, Sections 1-4, 12-17, 24, 33, 42, 43; 67 C.J.S. Pardons, Section 1-6; 30 ALR Judicial Investigation of Pardon by Governor, 238, 241, Supp. 65 ALR 1471.

Furthermore, assuming Appellant's right to vote was properly taken from him by reason of his felony conviction, the only way it can be restored is by an affirmative action of the Pardon Board. If the Pardon Board does nothing, the Appellant has not regained his right to vote.

Consequently, the Appellant is apparently asking the courts to mandamus the Governor and three other members of the Florida Pardon Board. Even if the act requested were not discretionary, and surely the decision of whether to bestow mercy is just that, the federal judiciary has refused to mandamus a Governor even where the duty to act was ministerial and created by the extradition clause of the United States Constitution. *Kentucky v. Dennison*, (1860), 24 How. 66, 65 U.S. 66, 16 L.Ed.2d 717; *Application of Middlebrooks*, (D.C. Cal. 1950), 88 F.Supp. 943, reversed on other grounds, *Ross v. Middlebrooks*, (C.A. 9, 1951), 188 F.2d 308, cert. den. *Middlebrooks v. Ross*, (1951), 72 S.Ct. 90, 342 U.S. 862, 96 L.Ed. 649; 35 C.J.S. Extradition, Section 4.

Even preliminary to any mandamus, the appropriate court would obviously have to require the Florida Pardon Board to explain the basis for its decision not to grant the Appellant a pardon. Then the court would presumably examine the reasons given by one of two sets of standards. The court could, of course, develop its own indicia of what constitutes a proper basis for "mercy," with the benefit of whatever guidance is afforded by the term "due process." Such an approach would simply substitute the judgment of a given federal judge for that of the Governor. The one other alternative would be to use the Pardon Board's own basis for one pardon as requiring the same treatment under the equal protection clause for another. This would put the federal courts in the position of examining a process very similar to the manner in which juries reach their verdicts.

The Appellant suggests it is offensive that the civil right of voting is subject to restoration on an arbitrary basis. But if this is offensive, consider how much more repugnant is the fact that the death penalty itself is subject to precisely the same arbitrariness. Surely there is no more "fundamental freedom," no more "preferred right" than that to life itself.

Imagine the range of factors -- conscious and subconscious, articulated and otherwise, that influence the decision of each individual member of the Florida Pardon Board on whether to commute a death sentence to life imprisonment.

Counsel is personally familiar with at least one instance where the simple credibility of a petitioner for a pardon was a major factor in the

decision of the Florida Pardon Board. How can such matters be made the basis of judicial review?

It is respectfully submitted that as a matter of simple good policy and judgment, it would be entirely unreasonable for the courts to attempt to police the pardon process.

All of these policy arguments simply underscore the soundness of the extensive legal authority cited by the court below for the doctrine that the courts do not have the power to invade the province of the executive and subject the Pardon Power to judicial review. Nor has the appellant cited a single authority for the argument that the judiciary does have the power of review over the Pardon Power. The ultimate answer to the Appellant's challenge is that the Pardon Power exists, and may be wielded in an arbitrary fashion not subject to judicial control, because that is precisely what the people willed in creating both the Presidential Pardon Power and the Florida Pardon Power.

CONCLUSION

The authority of a state to take the right to vote by reason of conviction of a crime and the right of a Pardon Board to refuse to restore this right have always been acknowledged by this court.

It is respectfully submitted it is manifest the Appellant has not presented a substantial challenge to these principles and, consequently, this Court should grant this Motion to Affirm.

Respectfully submitted,

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PROOF OF SERVICE

I, T.T.TURNBULL, one of the attorneys for the Appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the day of August, 1969, I served copies of the Foregoing Motion to Affirm upon the Appellant thereto, as follows:

RUFUS BEACHAM, on his own behalf and on behalf of all others similarly situated,

by mailing a true and correct copy, in a duly addressed envelope, with first-class postage prepaid, to the attorneys of record for this Appellant as follows:

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